Supreme Court, U.S.
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No.___

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SUSANA M. PACIFICO, Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT, Respondents

On Petition for a Writ of Certiorari to
The United States Court of Appeals
for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

Robert Stephen Bolinger
Counsel of Record

Law Office of R. Stephen Bolinger
16315 Piuma Avenue
Cerritos California 90701

19 pp

QUESTION PRESENTED

Whether the long standing "Mail Box" rule is still the law of the land, especially in rela tion to present communication methods.

Whether the interests of the Government in the efficient operation of the court clerks office should take precedence over a litigant's right to their day in court.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

SUSANA M. PACIFICO, Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT, Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Susana Pacifico Respectfully petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit in this case.

DECISION BELOW

The opinion of the Court of Appeals is attached hereto. On April 21, 1994 the court reaffirmed its decision and removed this case from the docket as having not been filed timely.

JURISDICTION

The Court of Appeals entered its final decision April 21, 1994.

The Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

The Petitioner in this case, Susanna Pacifico appealed from a decision of the Office of Personnel management. The Office of Personnel Management sent the decision to the wrong address, therefore the Appellant's representative never saw the decision nor the appeal form, and the OPM forwarded the decision to the appellant herself which arrived on the 4th of July weekend approximately seven days late. Appellant then sent her appeal to the Merit Systems Protection Board (by facsimile) on July 21, 1992.

The Agency claimed untimeliness. A hearing was held in Los Angeles on October 19, 1992, at

which time Pacifico presented her case on the merits and addressed the claim of untimeliness.

On November 18, 1992 the Administrative Law Judge of the MSPB, without addressing the merits of the case, ruled against Pacific and dismissed the appeal.

Pacifico timely appealed for reconsideration by the MSPB on December 23, 1992. The MSPB denied reconsideration on March 19, 1993 and an appeal was taken to The United States Court of Appeals for the Federal Circuit. The Appeal was mailed postage prepaid on April 15, 1993 three full days prior to the expiration of the appeal date. The case was docketed, briefs were submitted and the case was set for oral argument on April 4, 1994. On March 21, 1994 the Clerk of the Court of the Court of Appeals for the Federal Circuit removed the case from the docket as having been filed untimely. Appellant

filed a motion for reconsideration on April 7, 1994. On April 21, 1994 the Court of Appeals for The Federal Circuit denied the motion and entered judgment. On May 4, 1994 the Appellant filed a motion for further reconsideration, which was denied.

REASONS FOR GRANTING THE PETITION

I. The Decision Of The Court Of Appeals For The Federal Circuit Conflicts With The Holding Of Other Courts As To The Proper Application Of The Mail Box Rule And The Role Of The File Stamp.

It has been a long held principal of the Law of this country, both State and Federal that once a document is placed in the mails properly addressed it is deemed to be delivered, and that it will reach its destination in a timely manner. This

is the "Mail Box Rule". The rules of this court state that the Post Mark on a document filed with this court is controlling as to the date of filing, the same is true with the Internal Revenue Service. There is a long line of cases through the Federal judicial system that upholds this time honored doctrine.
In RE: Hobbs, 141 B.R. 466 (N.D. G . 1992). In RE: Schepps Food Stores Inc. 152 B.R. 136 (S.D. Tex 1993) Phillips v Riverside Inc. 796 F. Supp 403 (E.D. Ark 1992) Borden Company v.. United States 134 F. Supp 387, 391 (1955 DCNC); Federal Deposit Ins. Corp v. Schaffer 731 F2d 1134, 1137 (1984 CA 4th); Charlson Realty Company v. United States 384 F2d 434 (1967 USCC).

In the Charlson Case (Citations Omitted) the fact pattern was quite similar to the one presently before this court, whereas

the file stamp indicated a date past the time for filing. The court in Charlson went on to say:

File stamp on...petition by court house employee is nothing more than evidence of method of procedure, habit and custom followed by officers of court in handling papers to deliver them in proper discharge of their official duties, and such evidence adds nothing to the presumption that public officers perform the duties of their office in a proper manner and such presumption will not overcome nor rebut presumption of arrival of a letter in due course in mails. This is the same situation that faces the Petitioner in this case, all of the declarations show that the Appeal was properly addressed and placed in the United States Mail in Santa Ana, California on April 15, 1993, which was before the expiration of the statute of limit-

ations for the filing of the appeal. The file stamp was for May 10, 1993. Which only indicates when it was stamped, not when it was actually received. The Court of Appeals for the Federal Circuit appears to be following a different standard than the rest of the Federal Judicial system. They have chosen one that apparently disregards the Mail Box Rule and the Charlson Case (Citations Omitted) as well as the decisions of other federal courts and branches of the National Government, including the rules of this court (Rule 29.2).

Senior Judge Jones, in his concurring opinion, in the Charlson case Charlson Realty Company v. United States 384 F2d 434 (1967 USCC) perhaps stated the case best when he said:

This rule of the effective use of the mails is fair to everyone and unfair to

no one...The use and reliance upon the United States mail service is almost universal. People everywhere use its facilities. The service is essential to modern business operations.
An attitude that falls in line with the intentions of this court as expressed in Supreme Court Rule 29.2

II. The Decision Of The Court Of Appeals For The Federal Circuit Denies Petitioner Her Day In Court.

Certainly one of the most cherished rights of the American citizenry is that of one's day in court---this, perhaps more than anything else separates our form of government from any other on the face of the earth.

This court has upheld this doctrine numerous times. The constitution recognizes higher values than speed and ef-

ficiency: the bill of rights in general, and the due process clause in particular, were designed to protect the fragile values of vulnerable citizenry from the over bearing concern for efficiency and efficacy which may characterize praiseworthy government officials no less, and perhaps more than mediocre ones.

(S.CT.) Stanley v. Illinois 92 S Ct 1208; 405 U.S. 645; (S.Ct. 1981) Parratt v. Taylor (1981) 101 S.Ct. 1908, 451 U.S. 527.

The courts have an undeniable interest in maintaining the smooth and proper functioning of their own system but that right can not in all good conscience be held comparable with the right of the citizens to redress their grievances.

The court in Charlson Realty Company v.

United States 384 F2d 434 (1967 USCC) stated it as well as any when it said that the right to a day in court is one of the most highly prized rights of any citizen and that the courts usually manage to avoid denying someone their day in court. The petitioner has been denied her day in Court.

III. **The Question Presented Is Important**

The Petitioner is now left with no avenue to redress her grievances. She has been denied the opportunity to have her case fairly judged on its merits in the open forum of the courts. She has been denied her opportunity to be heard; a pillar of our system of government and laws.

The question also presents an important issue as to the validity of the Mail Box Rule and its survivability. Is this rule,

and subsequently rule 29.2, of this court still the standard, especially in the glaring light of modern technology that is overtaking society and business.

In sum, this court can address the issue of uniformity in the application of the Mail Box rule and reaffirm its importance and stability in our constantly changing world.

The court can also reaffirm its rulings in such cases such as (S.CT.) Stanley v. Illinois 92 S Ct 1208; 405 U.S. 645; (S Ct. 1981) Parratt v. Taylor 101 S.Ct. 1908, 451 U.S. 527.that the rights of the individual shall prevail when balanced against the interests of the Government for efficiency and smoothness of operation.

Respectfully Submitted

R. Stephen Bolinger

R. Stephen Bolinger
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FEDERAL CIRCUIT

PACIFICO V MSPB, 93-3346

ORDER

Upon further consideration of the petition for review, it appearing that it was not filed within the time permitted by law, it is

ORDERED that the petition for review be, and the asme hereby is, DISMISSED.

FOR THE COURT

March 18, 1994 Francis X. Gindhart
Clerk

CC: R. Stephen Bolinger, Esq.
Sherry Armstrong

ISSUED AS A MANDATE: April 21, 1994

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-3346

SUSANA M. PACIFICO

Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT

Respondent

PETITION FOR RECONSIDERATION

Law Office Of R. Stephen Bolinger
16315 Piuma Avenue
Cerritos California, 90701

The Petitioner does hereby Petition this court for reconsideration of its order of March 18, 1994.

DENIED. ON RECONSIDERATION, ANY CHANGE DENIED.

FOR THE COURT,

4-21-94 Francis X. Gindhart
Date FRANCIS X. GINDHART
Clerk

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

93-3346

SUSANA M. PACIFICO

Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT

Respondent

MOTION FOR FURTHER RECONSIDERATION

Law Office Of R. Stephen Bolinger
16315 Piuma Avenue
Cerritos California, 90701

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
MAY - 5 1994
FRANCIS X. GINDHART
CLERK

REJECTED. Repetitive motions to reconsider are not authorized.
REJECTED

FOR THE COURT,

5/5/94
Date

FRANCIS X. GINDHART
Clerk

(2)

Supreme Court, U.S.
FILED
NOV 16 1994
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No. 94-414

In the Supreme Court of the United States

OCTOBER TERM, 1994

SUSANA M. PACIFICO, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

DREW S. DAYS, III
Solicitor General

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the petition for review of the decision of the Merit Systems Protection Board was timely filed in the Federal Circuit.

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In the Supreme Court of the United States

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No. 94-414

SUSANA M. PACIFICO, PETITIONER

v.

OFFICE OF PERSONNEL MANAGEMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The judgment of the court of appeals (Pet. App. 13) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1994. A petition for reconsideration was denied on April 21, 1994. Pet. App. 14. Petitioner's motion for further reconsideration was denied on May 5, 1994. Pet. App. 15. The petition for a writ of certiorari was filed on July 20, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In 1991, the Office of Personnel Management (OPM) issued a decision holding that petitioner had received an overpayment of $22,575.37 in civil service annuity benefits. On June 22, 1992, after further evaluation of the case, OPM denied petitioner's request for a full waiver of overpayment liability, but issued a new decision reducing the amount of calculated overpayment to $13,493.52. OPM informed petitioner that she had a right to appeal that decision to the Merit Systems Protection Board (MSPB) and that she had 25 days from the date of the decision to do so.

On July 21, 1992, petitioner attempted to appeal OPM's decision to the MSPB. On July 23, an Administrative Judge (AJ) notified petitioner that her appeal appeared to be untimely and gave her an opportunity to show that it was timely filed or, alternatively, to show good cause for the delay. After a hearing, the AJ issued an initial decision on November 18, 1992, dismissing petitioner's appeal as untimely. Petitioner filed a petition for review of that decision with the full Board, which the MSPB denied on March 19, 1993. In its March 19 decision, the MSPB informed petitioner that she had a right to appeal the Board's final decision to the Federal Circuit "no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first."[1] Peti-

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[1] The Certificate of Service attached to the Order indicated that a copy of the Order was sent on March 19 by certified mail to Stephen Bolinger, petitioner's attorney, and by regular mail to petitioner. MSPB Order (Mar. 19, 1993).

tioner's counsel received notice of the decision by certified mail on or before March 22, 1993.[2]

Petitioner sought review of the MSPB's dismissal, allegedly mailing her petition for review to the Federal Circuit on April 15, 1993. Pet. 3. However, the petition for review was apparently not received by the clerk of the Federal Circuit until May 10, 1993. Pet. 7.[3] On March 18, 1994, twenty days before oral argument was scheduled, the court of appeals dismissed the petition for review as untimely. Pet. App. 13. Petitioner moved for reconsideration, asserting the presumption that letters properly addressed will be delivered in a timely manner. Petitioner's petition for reconsideration and a petition for further reconsideration were denied. Pet. 4.

ARGUMENT

Petitioner contends that the court of appeals erred in not applying the "Mail Box Rule" to the calculation of the filing deadline for her petition for review. Pet. 5. She argues that the court of appeals should have deemed

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[2] A return receipt request was sent to petitioner's counsel along with the final decision of the MSPB on March 19, 1993. The receipt was returned by mail on March 22, 1993.

[3] Petitioner's petition for review was stamped "Received" on May 10, 1993, and was also stamped "Filed" on that date. Petitioner's May 10, 1993, appeal was initially dismissed for technical deficiencies concerning the docketing fee required by Federal Circuit Rule 52(a)(1) and the lack of the requisite Rule 15(c) Statement Concerning Discrimination. Order by the Federal Circuit, June 9 dated 1993; Order by the Federal Circuit dated October 26, 1993. These deficiencies were cured, and the petition was reinstated on November 12, 1993.

The case was docketed, briefs were submitted, and oral argument was scheduled to take place on April 7, 1994. Order by the Federal Circuit dated February 28, 1994.

her petition for review to have been filed on April 15, 1993, the day it was mailed, pursuant to Supreme Court Rule 29.2.[4] Pet. 7. Neither the mail box rule nor Supreme Court Rule 29.2 applies to this case, however. Federal Rule of Appellate Procedure 25(a) (FRAP 25(a)) determines when documents mailed to the courts of appeals will be considered "filed." FRAP 25(a) provides that:

> Papers required or permitted to be filed in a court of appeals must be filed with the clerk. Filing may be accomplished by mail addressed to the clerk, but *filing is not timely unless the clerk receives the papers within the time fixed for filing*, except that *briefs and appendices* are treated as filed on the day of mailing if the most expeditious form of delivery by mail, except special delivery, is used.

(emphasis added).

The question here concerns the filing of a petition for review, rather than of a brief or appendix. The time for filing a petition for review of a final decision by the MSPB is set out in 5 U.S.C. 7703(b)(1). It allows a petitioner 30 days from the time that he or she receives notice of a final decision to file a petition for review in the Federal Circuit.[5] In this case, petitioner received

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[4] "To be timely filed, a document must actually be received by the Clerk within the time specified for filing; or be sent to the Clerk by first-class mail, postage prepaid, and bear a postmark showing that the document was mailed on or before the last day for filing." Sup. Ct. R. 29.2.

[5] Section 7703(b)(1) provides that: "a petition to review a final order or final decision of the [MSPB] shall be filed in the United States Court of Appeals for the Federal Circuit. Notwithstanding any other provision of law, any petition for review must be filed

notice of the final decision on or before March 22, 1993, but the petition for review was not received by the clerk until May 10, 1993. To be timely filed, her petition for review had to be received by the clerk of the court no later than April 22, 1993.

Contrary to petitioner's contention, the Federal Circuit did not apply "a different standard than the rest of the Federal Judicial system" (Pet. 7) when it deemed the petition to have been filed when it was received and not when it was mailed. The court of appeals applied the controlling rule, FRAP 25(a),[6] and its application is consistent with all the reported decisions of which we are aware. See, *e.g.*, *Pinat* v. *OPM*, 931 F.2d 1544, 1546 (Fed. Cir. 1991) (filing of a petition for review of an MSPB decision is deemed to have occurred "when the required papers are received by the clerk of the court"); *Guirguis* v. *INS*, 993 F.2d 508, 510 (5th Cir. 1993); *Danko* v. *Director, OWCP*, 846 F.2d 366, 369 (6th Cir. 1988); *Miller* v. *United States Postal Serv.*, 685 F.2d 148, 149 (5th Cir. 1982) (pursuant to FRAP 25(a) "the petition [for review of a final decision of the MSPB] must be *received* by the clerk within the applicable period, not mailed or postmarked during this period."), cert. denied, 461 U.S. 916 (1983).

Petitioner also contends that documents properly addressed and posted should be presumed to arrive in the ordinary course of mail delivery. *Charlson Realty Co.* v. *United States*, 384 F.2d 434, 442 (Ct. Cl. 1967); *Borden*

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within 30 days after the date the petitioner received notice of the final order or decision of the Board."

[6] Rule 25(a) of the Federal Rules of Appellate Procedure applies to the review of agency orders. Fed. R. App. P. 20; *Miller* v. *United States Postal Serv.*, 685 F.2d 148, 149 (5th Cir. 1982), cert. denied, 461 U.S. 916 (1983).

Co. v. *United States*, 134 F. Supp. 387, 391 (D.N.J. 1955). These cases do not address FRAP 25(a), however, or its specific language providing that filing occurs only upon the actual receipt of the documents. See *White* v. *INS*, 6 F.3d 1312, 1317-1318 (8th Cir. 1993) (although the petition for review was mailed five days before the filing deadline, the petition was barred as untimely under FRAP 25(a) because received one day after the deadline), cert. denied, 114 S. Ct. 2162 (1994). Any other interpretation would contradict the plain language of FRAP 25(a).

Petitioner cites several cases construing the common law presumption that a letter that is properly addressed, stamped and placed in the mail will be delivered to the addressee in a timely manner.[7] Cases construing such a rule, however, have no bearing on the application of FRAP 25(a). See *Vogelsang* v. *Patterson Dental Co.*, 904 F.2d 427, 429-430 (8th Cir. 1990) ("it is evident that the Federal Rules of Appellate Procedure do not equate simply placing a notice in the mail with the filing required by the rules"); *City of Chicago* v. *United States Dep't of Labor*, 737 F.2d 1466, 1471 (7th Cir. 1984) ("It is well settled that a notice of appeal or a petition for review is filed once the Court of Appeals receives actual custody of the document."); *Kahler-Ellis Co.* v. *Ohio Turnpike Comm'n*, 225 F.2d 922, 922 (6th Cir. 1955) ("Here, only the act of depositing the notice in the mails

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[7] *FDIC* v. *Schaffer*, 731 F.2d 1134, 1137 (4th Cir. 1984); *In re Schepps Food Stores, Inc.*, 152 B.R. 136, 139 (Bankr. S.D. Tex. 1993); *Phillips* v. *Riverside, Inc.*, 796 F. Supp. 403, 407 (E.D. Ark. 1992), and *In re Hobbs*, 141 B.R. 466, 468 (Bankr. N.D. Ga. 1992), do not involve filings of documents with federal courts of appeals; do not involve FRAP 25(a); and do not support the conclusion that the explicit rule set out in FRAP 25(a) should be ignored or superseded by the common law rule relied upon by petitioner.

occurred within thirty days. This is not a filing; only when the clerk acquires custody has it been filed.").

Petitioner's petition for review of the MSPB's March 19, 1993 decision was untimely. The Federal Circuit correctly dismissed the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

FRANK W. HUNGER
Assistant Attorney General

MARLEIGH D. DOVER
MARK C. NILES
Attorneys

NOVEMBER 1994

DEC 7 1994

(3)

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SUSANA M. PACIFICO, Petitioner

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OFFICE OF PERSONNEL MANAGEMENT, Respondents

On Petition for a Writ of Certiorari to
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for the Federal Circuit

BRIEF FOR THE PETITIONER IN REPLY

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9 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTION PRESENTED

Whether the long standing "Mail Box" rule is still the law of the land, especially in relation to present communication methods.

Whether the interests of the Government in the efficient operation of the court clerks office should take precedence over a litigant's right to their day in court.

Whether the petition for review of the decesion of the Merit Systems Protection Board was timely filed in the Federal Circuit

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

No 94-414

SUSANA M. PACIFICO, Petitioner

v.

OFFICE OF PERSONNEL MANAGEMENT, Respondents

BRIEF FOR THE PETITIONER IN REPLY

OPINION BELOW

The judgment of the court of appeals (Pet. App. 13) is unreported.

JURISDICTION

The Court of Appeals entered its final decision April 21, 1994.

The Jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

The Petitioner in this case, Susanna Pacifico appealed from a decision of the Office of Personnel management. The Office of Personnel Management sent the decision to the wrong address, therefore

the Appellant's representative never saw the decision nor the appeal form, and the OPM forwarded the decision to the appellant herself which arrived on the 4th of July weekend approximately seven days late. Appellant then sent her appeal to the Merit Systems Protection Board (by facsimile) on July 21, 1992.
The Agency claimed untimeliness. A hearing was held in Los Angeles on October 19, 1992,

On November 18, 1992 the Administrative Law Judge of the MSPB, without addressing the merits of the case, ruled against Pacific and dismissed the appeal. Pacifico timely appealed for reconsideration by the MSPB on December 23, 1992. The MSPB denied reconsideration on March 19, 1993 and an appeal was taken to The United States Court of Appeals for the Federal Circuit. The Appeal was mailed postage prepaid on April 15, 1993 three

full days prior to the expiration of the appeal date. The case was docketed, briefs were submitted and the case was set for oral argument on April 4, 1994. On March 21, 1994 the Clerk of the Court of the Court of Appeals for the Federal Circuit removed the case from the docket as having been filed untimely. Appellant filed a motion for reconsideration on April 7, 1994. On April 21, 1994 the Court of Appeals for The Federal Circuit denied the motion and entered judgment. On May 4, 1994 the Appellant filed a motion for further reconsideration, which was denied.

ARGUMENT

It has been a long held principal of the Law of this country, both State and Federal that once a document is placed in the mails properly addressed it is deemed

to be delivered, and that it will reach its destination in a timely manner, in the proper course of the mails Federal Deposit Ins. Corp. v. Schaffer 731 F.2d 1134, 1137; Hagner v. United States 285 U.S. 427, 430 (1932) Rosenthal v. Walker 111 U.S. 185, 193.

The respondents have not provided any authority to show that this is no longer the accepted rule in this country. On the contrary several of their own cited cases uphold the rules that the presumption that a letter properly addressed and mailed is properly delivered and that this presumption is one that is not easily overcome. FDIC v. Schaffer 731 F.2d 1134, 1137 (4th Cir. 1988)

In City of Chicago v. United States Dep't of Labor 737 F.2d 1466 (7th Cir. 1984) the court held that a petition or an appeal is deemed filed once the court

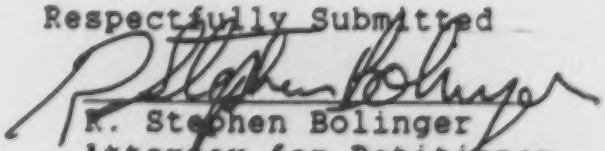
receives actual custody of the filing document. This is the contention of the Appellant, that under the presumptions of the mail box rule that mail is delivered timely in the normal course of postal business that the Court of Appeals had custody of the appeal timely. The stamp on the front of the document does not represent when the court took custody but rather when it appeared on the clerks desk as the appellant has set forth in her cited case of Charlson Realty Co. v. United States, 384 F.2d 434 Ct.Cl. 1967)

The respondents have not brought forth anything to show that the appeal and it's attendant envelope arrived at the Court House untimely. Once at the Courthouse it is no longer in transit and is in the custody of the court (See City of Chicago v. United States Dep't of Labor, 737 F.2d 1466. and Charlson Realty Company v. United States 384 F2d 434 (1967 Ct.Cl.).

CONCLUSION

It is only fair that the parties have a fair and level playing field. Both the OPM and the Merit Systems Protection Board, as well as the Courts, have chosen the United States Mail as the medium of exchange in this case; The petitioner should not be punished because she also chose the same medium.

Respectfully Submitted



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